KIRK RHONE

IBLA 82-564 Decided October 20, 1983

Appeal from decision of Utah State Office, Bureau of Land Management, rejecting noncompetitive oil and gas lease offer. U-49937.

Affirmed.

1. Oil and Gas Leases: Applications: Attorneys-in-Fact or Agents -- Oil and Gas Leases: Noncompetitive Leases

BLM may properly reject a noncompetitive oil and gas lease offer where an attorney-in-fact signed the offer and submitted the first year's rental and the power of attorney did not prohibit the attorney-in-fact from filing offers on behalf of other participants, as required by 43 CFR 3112.4-1(b).

APPEARANCES: Warren L. Troupe, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Kirk Rhone has appealed from a decision of the Utah State Office, Bureau of Land Management (BLM), dated February 11, 1982, rejecting his noncompetitive oil and gas lease offer, U-49937.

Appellant's application was drawn with first priority for parcel UT 44 in the September 1981 simultaneous oil and gas lease drawing. On December 7, 1981, BLM forwarded lease forms to appellant for signing and required payment of the first year's advance rental, in accordance with 43 CFR 3112.4-1. BLM stated that: "Only the personal handwritten signature of the prospective lessee, or an attorney-in-fact, in ink, is acceptable. The first year's rental will only be accepted from the applicant, or an attorney-in-fact." On January 4, 1982, BLM received the first year's advance rental payment and lease forms signed by Margaret Houghtalen, "Attorney in Fact." Appellant also submitted a power of attorney from appellant to Margaret Houghtalen, dated December 31, 1981, authorizing her to sign the lease forms.

The applicable regulation, 43 CFR 3112.4-1(b) provides, in relevant part, that: "An attorney-in-fact may sign the lease offer and pay the first year's rental only if the power of attorney prohibits the attorney-in-fact from filing offers on behalf of any other participants." In its February 1982

decision, BLM concluded that appellant had violated 43 CFR 3112.4-1(b) because Margaret Houghtalen had signed lease offers as attorney-in-fact for appellant (U-49937) and, also, for Alice Rhone (U-49940).

In his statement of reasons for appeal, appellant contends that he has not violated 43 CFR 3112.4-1(b) because that regulation was promulgated as a part of a regulatory change directed at abuses by lease filing services and that Margaret Houghtalen is not such a service, as defined in 43 CFR 3100.0-5(d) ("person or entity in the business of providing assistance to participants in a Federal oil and gas leasing program"). See 45 FR 35163 (May 23, 1980). Thus, appellant suggests that he should not be penalized for a technical violation of the regulations. Appellant also argues that 43 CFR 3112.4-1(b) is ambiguous and should not be construed so as to deprive an applicant of a statutory right, citing Mary I. Arata, 4 IBLA 201 (1971). Appellant contends that the regulation is unclear as to whether an attorney-in-fact is prohibited from filing lease offers on behalf of applicants for the same parcel or any parcel in the same drawing.

Appellant indicates that he and his wife, Alice Rhone, both were drawn with first priority on two separate tracts of land in the September 1981 drawing. Because they were unable to obtain the necessary funds to cover two first-year rental payments they were forced to borrow money from their aunt, Margaret Houghtalen. However, mindful of the language of 43 CFR 3112.4-1(a) which stated "the first year's rental shall be paid only by the applicant, or his/her attorney-in-fact" appellant believed that the only method by which appellant could properly use the funds provided by his aunt was to make her an attorney-in-fact for both of their offers. In doing so, however, appellant was ignorant of the prohibition in 43 CFR 3112.4-1(b) preventing an attorney-in-fact from filing offers for more than one participant.

[1] Appellant does not dispute that his noncompetitive oil and gas lease offer was signed or that the first year's advance rental was paid by an attorney-in-fact. In such circumstances, 43 CFR 3112.4-1(b) provides that the power of attorney must prohibit "the attorney-in-fact from filing offers on behalf of any other participant." The copy of the power of attorney from appellant to Margaret Houghtalen does not do this. In fact, as BLM points out, Margaret Houghtalen did file another lease offer on behalf of Alice Rhone. This would appear to be a clear violation of the regulation.

Appellant is correct in his statement that the promulgation of 43 CFR 3112.4-1(a) and (b) was, in part, directed at abuses of "filing services." See 44 FR 56176 (Sept. 28, 1979). Thus, the Department noted that: "Some services have advanced the first year's rental and obtained leases which have then been assigned without their client's knowledge." Id. In order to "increase an applicant's involvement and reduce the influence of agents in the process," the Department provided in its proposed rulemaking that the lease offer be signed and the first year's rental be submitted by the lease applicant. 45 FR 35159 (May 23, 1980). However, in its final rulemaking, the Department changed the regulation to permit an attorney-in-fact to sign the offer and submit the first year's rental "if the requirements of the section [43 CFR 3112.4-1(b)] are followed." Id. This was done to provide "greater flexibility for the leasing system." Id. Accordingly, while an attorney-in-fact might act on behalf of a single offeror in these instances,

the regulation was worded in such a way so as to limit an attorney-in-fact to one participant in the simultaneous oil and gas leasing system, at any given time. This was intended to promote a more direct relationship between an offeror and his or her attorney-in-fact, and thereby involve an offeror more directly in the process. Moreover, it prevented filing services from acting as attorneys-in-fact on behalf of several participants in this manner and effectively precluded them from offering that service to their clients. This eliminated major areas of possible abuse.

Appellant asserts that the regulation is ambiguous. Were this the case, we would hold that it does not provide an adequate basis for depriving an applicant of a statutory right. See Audrey Jean Boston, 67 IBLA 117 (1982). However, we can discern no ambiguity in the regulation. As written, 43 CFR 3112.4-1(b) simply provides that a power of attorney must provide that an attorney-in-fact may act, in signing the lease offer and submitting the first year's advance rental, on behalf of only one participant in a simultaneous oil and gas lease drawing, at any time during which a power of attorney is in effect.

Appellant suggests that there is a lack of clarity in the regulatory proscription and contends that it is impossible to determine whether the regulation prohibits "an attorney-in-fact from filing offers on behalf of more than one participant on the same parcel or * * * from filing offers on behalf of any other participant during the referenced monthly Simultaneous Oil and Gas Lease Drawing" (Statement of Reasons at 7). Appellant's argument, however, discloses a fundamental misperception of the simultaneous system as it has operated since 1980.

Prior to the 1980 amendments, a drawing entry card (DEC) was an offer to lease. See 43 CFR 3112.2-1(a)(1979). In a major revision of the regulations promulgated on May 23, 1980, 45 FR 35163, the nature of the DEC was drastically altered. The DEC's tendered pursuant to a simultaneous posting are no longer offers to lease, but are rather "applications to lease." As is now noted in the regulations, "The first applicant for a lease, as determined under the regulations in this subpart, who is qualified to hold a lease * * * shall be entitled to submit an offer for the lease." 43 CFR 3112.2-1(a)(1982). Only the successful applicant files an offer and thus it is not possible for an attorney-in-fact to file more than one offer on the same parcel. Clearly the regulation was not designed to prohibit what, in fact, could not occur. Thus, the only realistic interpretation of the prohibition is that it prohibits an attorney-in-fact from representing more than one offeror at the same time for any parcel rather than prohibiting representation of more than one offeror for the same parcel.

The language of the regulation clearly prohibits an attorney-in-fact from acting as an attorney-in-fact for one individual so long as he or she is authorized to act as an attorney-in-fact for another individual. Indeed, the regulation specifically requires the attorney-in-fact authorization to expressly prohibit the attorney-in-fact from filing offers on behalf of any other participant. Not only was this not done in the instant case, the sequence of events shows that the substance of the regulation was violated as well. Margaret Houghtalen signed both offers on the same day and they were

submitted together to the State Office. This is precisely what the regulation is designed to prevent.

Appellant also argues that the regulation is not directed at the situation involved herein, where Margaret Houghtalen is not an agent within the meaning of 43 CFR 3100.0-5(d). The fact that she is not an "agent" within the meaning of 43 CFR 3100.0-5(d) is simply not germane to the question of her status as an "attorney-in-fact." While it is conceivable that, in certain limited circumstances, an "agent" may also serve as an "attorney-in-fact," the regulatory strictures limiting an attorney-in-fact to a single offeror will normally make it impossible for an agent to be an "attorney-in-fact." Indeed, this is the contemplation of the regulation. Thus, it is to be expected that in the vast majority of cases the attorney-in-fact will not be an agent under 43 CFR 3100.0-5(d). The regulation clearly applies in the present instance. BLM properly rejected appellant's oil and gas lease offer. 43 CFR 3112.6-1(d).

We are not unmindful of the fact that appellant's recourse to the attorney-in-fact provision was occasioned by his and his wife's inability to raise the money for two separate parcels in the same month conjoined with the admonition of 43 CFR 3112.4-1(a) that "the first year's rental shall be paid only by the applicant, or his/her attorney-in fact." (Emphasis supplied.) Indeed, insofar as this payment limitation is concerned, the Board has refused to enforce it on the grounds that it is ambiguous. See Brian D. Haas, 66 IBLA 353 (1982). However, while appellant may have been misled by this regulation into a belief that he could borrow money from his aunt only if she were made an attorney-in-fact, nothing in the attorney-in-fact regulation justified his belief that his aunt could be an attorney-in-fact for both him and his wife. In other words, the ambiguity in 43 CFR 3112.4-1(a) did not cause him to run afoul of 43 CFR 3112.4-1(b), since his violation of the latter regulation was independent of anything in 43 CFR 3112.4-1(a). In order for appellant to avail himself of the doctrine that priorities established in the simultaneous system will not be disturbed because of a violation of a regulatory provision where the violation was caused by ambiguity in draftsmanship, appellant must show a nexus between the action which he took and the ambiguous language. See Hickory Creek Oil Co., 63 IBLA 313 (1982).

Appellant also notes that the Department has published interim final rulemaking which deleted the requirements regarding submission of evidence of agency qualifications, formerly under 43 CFR 3102.2-6 (1981). 47 FR 8544 (Feb. 26, 1982). Appellant states that it would be a "pointless contradiction for the BLM to reject this Application Offer on the basis of a regulation which has been substantially amended." This statement is simply not correct. The applicable regulation, 43 CFR 3112.4-1(b), was not amended in the interim final rulemaking. It was not amended precisely because the purpose of 43 CFR 3112.4-1(b) is independent of attempts by BLM to control actions by filing services.

The disclosure requirements concerning agency qualifications were primarily directed to ascertaining whether the agent had an undisclosed interest in the lease application and to determining whether a prohibited multiple filing had occurred. Prior to the 1982 amendment, every filing service was

required to file a copy of the filing service agreement or make reference to a copy on file everytime an application to lease was tendered, regardless of whether or not it ultimately was drawn with any priority whatsoever. This caused a great deal of paperwork both for BLM and filing services. The effect of the 1982 amendment was to obviate the need to submit such documents with every application, though BLM still retained authority in the course of its adjudication of priorities to require submission of such agreements where sufficient doubt as to compliance with the substantive regulations was raised. In fact, the change permitted BLM to continue its scrutiny to prevent abuse of the simultaneous system, while at the same time lessening the paperwork involved for all parties, since such scrutiny would now only be directed at applicants who had an opportunity to acquire a lease, i.e., those drawn with priority.

In contradistinction, 43 CFR 3112.4-1(a) and (b) already applied only to lease offers, as opposed to applications to lease. Thus, this regulation never generated the volumes of paperwork which accompanied 43 CFR 3102.2-6 (1981), since it came into play only for those whose applications had been drawn with priority. Moreover, while the purposes originally animating 43 CFR 3102.2-6 (1981) could still be achieved by limiting submissions to those drawn with priority rather than requiring all agency-assisted applicants to submit them with the application, this change had no effect at all on the rationale for 43 CFR 3112.4-1(a) and (b) since these latter provisions had always applied only to successful drawees. The 1982 change in 43 CFR 3102.2-6 (1981) simply has no effect on the continued validity of 43 CFR 3112.4-1(a) and (b).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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James L. Burski
Administrative Judge

We concur:

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Gail M. Frazier
Administrative Judge

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Will A. Irwin
Administrative Judge